OMRON ELECTRONICS SALES AND SERVICES SDN BHD A

v.

PHOON WAI KIT & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
HADHARIAH SYED ISMAIL JC
[APPLICATION FOR JUDICIAL REVIEW NO: R3(2)-25-88-2006]
15 FEBRUARY 2010

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application* C
for - Whether Industrial Court acted beyond jurisdiction in making order for payment of compensation in lieu of reinstatement - Failure to identify issues whether applicant company had forced first respondent to resign - Whether decision was perverse and irrational that no reasonable body could have made in the circumstances D

The first respondent was appointed as a manager in Omron Malaysia Sdn Bhd, the holding company of the applicant company. Subsequently, the first respondent was seconded to FS Automation Pte Ltd (wholly owned by Omron Asia Pacific Pte Ltd) to undertake E
the venture into the marketing of lower cost electronic components for the Malaysian market. After one year, it became clear that the business was a failure and the holding company decided to close down the business. FS Automation Pte Ltd terminated the first respondent's secondment. The first respondent returned to the F
applicant company where he had to occupy one empty desk temporarily since his previous room had been converted to the director's room. Angry and distraught, the first respondent prepared a resignation letter. Upon receipt of the first respondent's resignation letter, the applicant company proceeded to pay to the G
first respondent RM60,274 which included an *ex gratia* amount of RM53,550 as a gesture of goodwill for the number of years the first respondent had worked in the applicant company. The first respondent, after receiving the *ex gratia* payment, filed a claim for reinstatement at the Industrial Relations Department under s. 20(1) H
of the Industrial Relations Act 1967 which was then referred to the second respondent. The crux of the first respondent's complaint at the Industrial Court was that he was forced to resign from the applicant's company. The second respondent made a decision that the first respondent's dismissal by the applicant was without just I
cause and excuse. In consequence thereto, the second respondent

made an award for the payment of compensation *in lieu* of reinstatement amounting to RM212,351 to the first respondent. Against the said order, the applicant applied to this court for an order for *certiorari* to quash the award of the second respondent. The decision of the second respondent was challenged on the grounds that (i) it had erred in law or acted beyond/or without jurisdiction in making the order for the payment of compensation *in lieu* of reinstatement and (ii) the decision was perverse and unreasonable that no reasonable body or tribunal in a similar circumstance could reasonable make the decision it did.

Held (allowing the application with costs):

(1) It was the allegation of the first respondent that he was forced to resign by the applicant. However, there was no evidence adduced to show that the first respondent was not allowed to think over the matter, not allowed to come out of the office and was physically restrained and had signed under protest. On the contrary, the evidence adduced showed the first respondent's resignation was voluntary. The first respondent had failed to discharge the burden of proof placed upon him and the matter should have ended then and there. (paras 26 & 27)

(2) The chairman had failed to identify the issues that it was asked to determine namely whether the applicant's company had forced the first respondent to resign. The chairman had also failed to appreciate the rule that the court is duty bound to adjudicate on the matters raised by the parties in the pleadings. The court must confine itself to those issues raised by the parties and not decide on matters the parties never asked the court to do and more importantly when the matter was a non-issue at all. (para 32)

(3) The chairman had given too much weight to the applicant's company conduct of not giving the first respondent a room to sit when he reported for duty at the applicant's company, not giving him any work to do and taking away the tools of his trade. These were not the elements to be considered in determining whether there was a forced resignation. (para 32)

(4) The chairman had failed to identify the issues, had asked himself the wrong questions, had taken into consideration irrelevant matters, had departed from the pleadings and had

applied the wrong test and law in coming to his decision. The decision was perverse, irrational and unreasonable that no reasonable body or body of persons could have made in the circumstances. (para 33)

Case(s) referred to:

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 CA ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Tata Robinson Frase Co Ltd v. Labour Court, 1989-II-LL J 443 ***(refd)***

Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor [1998] 1 LNS 258 HC ***(refd)***

Western Excavating (EEC) Ltd v. Sharp [1978] 2 WLR 344 ***(refd)***

William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA ***(refd)***

Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(1), 56

For the applicant - Ramadass; M/s Ramadass & Assocs

For the 1st respondent - Tan Kim Siong; M/s Tan Kim Siong & Teh Hong Jet

Reported by Suhainah Wahiduddin

JUDGMENT

Hadhariah Syed Ismail JC:

[1] On 16 March 2006, the 2nd respondent made a decision that the 1st respondent's dismissal by the applicant was without just cause and excuse. In consequence thereto, the 2nd respondent then made an award for the payment of compensation *in lieu* of reinstatement amounting to RM212,351 to the 1st respondent. Against the said order, the applicant now applied to this court for an order for *certiorari* to quash the award of the 2nd respondent.

A **Background Facts**

[2] The 1st respondent was appointed as a manager in Omron Malaysia Sdn Bhd on 15 May 1991. Omron Malaysia Sdn Bhd is a company owned by Omron Asia Pacific Pte Ltd based in Singapore. In August 1991, the 1st respondent was transferred from Omron Malaysia Sdn Bhd to the applicant company.

[3] Omron Asia Pacific Pte Ltd is the holding company of the applicant company and deals with the supply of high quality electronic components.

[4] Sometime in or around 1997, the holding company decided to venture into the marketing of lower cost electronic components for the Malaysian market in direct competition with electronic components imported from Taiwan and China.

[5] On being informed of the holding company's intention, the 1st respondent volunteered to undertake the entire venture in the Malaysian market for the holding company. The 1st respondent even suggested the use of his house as the base and office for the new business to be set up in Malaysia. This fact was admitted by the 1st respondent.

[6] After considerable persuasion by the 1st respondent, the applicant company agreed to allow the 1st respondent to be seconded to FS Automation Pte Ltd which is wholly owned by Omron Asia Pacific Pte Ltd for two years from 1 August 1997 to 31 July 1999, after which he shall be given the option to remain and be employed by FS Automation Pte Ltd or to return to the holding company.

[7] All the cost for the setting up and maintenance of the business was borne by the holding company including the purchase and installation of air-conditioning, cabinets, tables, chairs etc. The 1st respondent was even paid RM1,500 per month as rental for the usage of his house as an office. In addition, the 1st respondent was supplied with a car, handphone, computer, multi-meter, fax machine, printer and etc for the use of this new business.

[8] After about one year, it became clear that the business was a failure and the holding company decided to close down the business. FS Automation Pte Ltd wrote a letter dated 1 September 1998 to the 1st respondent terminating his secondment with effect from

30 September 1998. The 1st respondent was also told to return the FS Automation's property placed in the temporary office to one Mr Edward Yew.

[9] On being informed of the holding company's decision to close down the business, the 1st respondent became angry, distraught and demonstrated his feelings openly toward certain staffs of the applicant's company. The 1st respondent was later told that he could return to his previous job with the applicant company.

[10] Upon the termination of the secondment, the 1st respondent came back to the applicant company on 1 October 1998. However, up to the time he came back to the applicant company, the 1st respondent has not returned all the equipments connected to the business of FS Automation. Only on 4 October 1998 and 5 October 1998, the 1st respondent returned the equipments to Mr Edward Yew.

[11] When the 1st respondent came back to the applicant company, he had to occupy one empty desk temporarily since his previous room had been converted to the director's room after his secondment to FS Automation. The other rooms were occupied and there was no vacant room available.

[12] Before the applicant could arrange for a proper room for the 1st respondent, the 1st respondent approached the applicant company and spoke of his intention to resign. The 1st respondent also asked whether he would be entitled to any extra payment if he left the applicant company since he had been with the applicant company for some time. The 1st respondent was informed that he was not entitled to any severance pay if he resigned. The 1st respondent was asked to reconsider his decision to resign. But the 1st respondent was adamant and requested the applicant's General Manager, Mr YT Loy to appeal on his behalf to the Board of Directors of the applicant company to see if some form of *ex gratia* payment could be made to the 1st respondent for his years of service.

[13] Upon obtaining the Board of Directors approval for an *ex gratia* payment to be made to the 1st respondent on compassionate grounds, the 1st respondent was duly informed and was requested to sign a letter of resignation prepared by Mr Edward Yew before collecting the *ex gratia* payment cheque.

[14] However, the 1st respondent refused to sign the resignation letter and insisted on submitting his own resignation letter and refused to show the letter to Mr Edward Yew. Mr YT Loy informed Mr Edward Yew to insist on viewing the said letter before handing over the cheque to the 1st respondent. Upon receiving and reading the letter of resignation prepared by the 1st respondent, Mr Edward Yew informed the 1st respondent that such a letter would only serve to irritate the Board of Directors especially since it was not true and gives the impression that the 1st respondent was not resigning voluntarily on his own accord. The 1st respondent conceded and agreed with Mr Edward Yew that the contents of the said letter was not correct.

[15] The 1st respondent then agreed to retract the said letter of resignation and then re-tendered his resignation *vide* another letter dated 22 October 1998. The 1st respondent told Mr TY Loy that he felt the letter of resignation should be prepared by him and not by the applicant company since it was him who was resigning. The 1st respondent states he was capable of writing his own resignation letter and did not need the applicant company to write one for him. Mr Edward Yew agreed to accept the 1st respondent's new letter of resignation.

[16] Upon receipt of the 1st respondent's resignation letter, the applicant company proceeded to pay to the 1st respondent RM60,274 which included an *ex gratia* amount of RM53,550 as a gesture of goodwill for the number of years the 1st respondent had worked in the applicant company.

[17] After receiving the *ex gratia* payment, the 1st respondent then filed a claim for reinstatement at the Industrial Relations Department under s. 20(1) of the Industrial Relations Act 1967 and since there was no settlement at the department, the YB Minister of Human Resources referred the matter to the 2nd respondent for a decision. The decision, mentioned above, is now the subject matter of this judicial review.

Grounds Of Application

[18] The decision of the 2nd respondent was challenged on the following grounds:

(a) It had erred in law or acted beyond and/or without jurisdiction in making the order for the payment of compensation *in lieu* of reinstatement.

(b) It failed to take into consideration relevant matters.

(c) It had taken into consideration irrelevant matters.

(d) The decision is perverse and unreasonable that no reasonable body or tribunal in a similar circumstance could reasonably make the decision it did.

(e) It had acted *ultra vires* and /or outside the scope of s. 56 of the Industrial Relations Act 1967.

Function Of Review Court

[19] It has been established that the High Court in exercising its supervisory power cannot interfere with the decision of an Industrial Court unless it can be shown that the decision is so unreasonably, perverse that no reasonable person or body of person will come to such a decision. In *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 at p. 348, Mohd Azmi FCJ made the following observation:

> In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions the Industrial Court looked at objectively were so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v. JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p 916, and judgment of Lord Diplock in *Bromley London Borough Council v. Greter London Council & Anor* [1983] 1 AC 768 at p 831; [1982] 1 All ER 153 at p 159; [1982] 2 WLR 92 at p 100)

[20] The above observation is quoted with approval by Gopal Sri Ram JCA (now FCJ) in *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9 and is binding on this court.

Statement Of Case Of The 1st Respondent

[21] In para. 13 of his statement of case, the 1st respondent pleaded *inter alia* that faced with the threat of dismissal and unable to tolerate any more of such humiliation and unfair treatment by the company, he was left with no choice but to accept the company's offer that he resigned with compensation of one month's salary for every year of service. Consequently, he wrote a letter of resignation dated 21 October 1998.

[22] In view of the above, it is crystal clear that the crux of the 1st respondent's complaint at the Industrial Court was that he was forced to resign from the applicant's company. Therefore it is incumbent on this court to have an insight on the law relating to forced resignation.

The Law On Forced Resignation

[23] Learned counsel for the applicant referred this court to the case of *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] 1 LNS 258 wherein Abdul Kadir Sulaiman J (as he then was) explained the proposition of the law on burden of proof under the Industrial Relations Act 1967 as:

> the law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is *prima facie* done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not arise: see *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 SC. In the present case, it is the first respondent who asserts that she was dismissed and the applicant denies it. So, it is for the first respondent to establish so by the evidence ...

[24] Similarly, in this case, it is the 1st respondent who alleged that he was forced to resign by the applicant and the applicant denies it. Therefore, based on the above case, the burden lies on the 1st respondent to establish his allegation. If he fails to discharge the burden, there is no onus on the applicant to establish anything because in such a situation, no dismissal has taken place and the question of it being without just cause or excuse does not arise at all.

[25] As to what elements need to be proved by the 1st respondent to establish forced resignation, Abdul Kadir Sulaiman J in the same case referred to the book entitled "*Cases and Material on Resignation, Transfer and Suspension*" by Prof SB Rao and quoted the following passage from *Tata Robinson Frase Co Ltd v. Labour Court*, 1989-II-LL J 443 (Pat, HC):

To make out a case that his resignation was not voluntary and his resignation was obtained under undue influence, misrepresentation, fraud or the like, the employee has to establish that he was not allowed time to think over the matter, not allowed to come out of the office but was physically restrained and he had signed under protest.

[26] Having perused the records of the proceedings before the learned Chairman, this court cannot find any evidence adduced to show that the 1st respondent was not allowed to think over the matter, not allowed to come out of the office and was physically restrained and he had signed under protest. On the contrary, the evidence adduced shows the 1st respondent's resignation was voluntary. This is evident from the answers given by the 1st respondent during cross-examination, found on pp. 164, 167, 168 and 171 of the notes of proceedings. The answers are reproduced below:

(i) Yes, I agree that after the Board had agreed to give me an *ex gratia* payment, then I agreed to resign. Yes I prepared a letter of resignation voluntary.

(ii) Agree that when the company refused to accept my first letter, I had the option not to resign. Yes, when I put in CL8, I did it on my own free will.

(iii) ... when the company refused to accept my first resignation letter, I had the option not to resign.

(iv) I do not recall Mr Tanaka asking me to resign from the company.

(v) Mr Loy or Mr Yew did not ask me to resign from the company.

(vi) The managing director did not at any time ask me to resign from the company.

[27] It is obvious that based on the above evidence alone, the 1st respondent has failed to discharge the burden of proof placed upon him and the matter should have ended then and there. Unfortunately, the learned chairman ignored this crucial evidence and embarked to consider on other irrelevant matters not asked by the parties to be decided by the court. It is therefore pertinent to this court to examine how the chairman arrived at his decision.

A **Findings Of The Chairman**

[28] In deciding the issue of dismissal, the learned chairman came to the conclusion that:

> B From the facts adduced before this court, this court is more than satisfied that the conduct of the employer was certainly unfair and unreasonable. What they had done was to make life so intolerable for the claimant that the claimant had no alternative but to resign. The purported resignation is not a resignation but it is rather a dismissal.
>
> C The conduct of the employer was such that the employer was guilty of a breach going to the root of the contract and they certainly showed an intention no longer to be bound by the contract.
>
> D To answer the question posed in the issues to be tried as stated earlier in respect of the conduct of the company's officers, the resignation of the claimant was not voluntarily and that resignation was obtained by duress by making the claimant E working life intolerable.
>
> The court is more than satisfied that the company has no just cause or excuse to dismiss the claimant by forcing him to resign on 22 October 1998.

F **1st Respondent's Submission**

[29] Learned counsel for the 1st respondent urge this court not to disturb the findings made by the 2nd respondent, relying on *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] G 1 CLJ 147; *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235; *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; *Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) H 183; *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 and *Western Excavating (EEC) Ltd v. Sharp* [1978] 2 WLR 344. It is the 1st respondent's contention that the applicant's conduct of forcing the 1st respondent to resign from FS Automation, not providing him a I room, not giving him any work and taking away his tools of trade constitutes a fundamental breach going to the root of the contract and evinces an intention not to be bound by the contract.

[30] The submission seems to focus on the law of constructive dismissal which is not the case here. The 1st respondent's pleaded case is he was forced to resign and breach of natural justice. The word "constructive dismissal" or "the first respondent considered himself as constructively dismissed" was never pleaded. Therefore the argument on constructive dismissal cannot be accurate. The 1st respondent has chosen a specific reason for his dismissal and that is forced resignation. Therefore the 1st respondent cannot mix up that reasoning with constructive dismissal because each reasoning is distinct and attract different principles of law and considerations.

[31] To resolve the dispute, this court must look at the decision making process of the 2nd respondent.

Irrelevant And Erroneous Matters Considered By The Chairman

[32] Reading the records of the proceedings and the awards before the learned chairman, I cannot help from saying the chairman had taken into consideration irrelevant matters in coming to the decision he did. I say so for the following reasons:

(a) The 1st respondent's pleaded case is he was asked by Mr Yukio Tanaka, the Deputy Managing Director of FS Automation to resign and he would be dismissed should he refuse to do so. In other words the instruction to resign comes from FS Automation and for the 1st respondent to resign from FS Automation, not the applicant company. Whereas the 1st respondent's claim before the court is he was forced to resign by the applicant company. FS Automation and the applicant company are two separate legal entities. Despite that the chairman took into account the irrelevant fact that Mr Tanaka was not called by the applicant company to refute the 1st respondent's allegation that he was asked to resign from FS Automation. This is obvious when the chairman opined:

> Mr Tanaka was not called to refute what was testified by the claimant; that is Mr Tanaka has asked the claimant to resign from FS Automation and if he did not do so, he will be dismissed from FS Automation. In other words this court accepts the claimant's contention that Mr Tanaka had, in fact, asked the claimant to resign from FS Automation.

From the reasoning given by the chairman, it is obvious that the chairman had failed to identify the issues that it was asked to determine namely whether the applicant's company had forced the 1st respondent to resign.

The chairman also had failed to appreciate the rule that the court is duty bound to adjudicate on the matters raised by the parties in the pleading; see *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197. The court must confine itself to those issues raised by the parties and not decide on matters the parties never asked the court to do so and more importantly when the matter was a non-issue at all. In this case, it was an admitted fact that the 1st respondent was asked to resign from FS Automation and there is no need for an Industrial Court to make a ruling on it. Therefore, the chairman was clearly in error when he took into consideration the failure of the applicant to call Mr Tanaka when the same is irrelevant and a non-issue.

(b) Still on the same issue, I found the chairman had also failed to take into consideration the fact that the 1st respondent did not tender his resignation letter to FS Automation. If the chairman had considered this fact, he would have realized then that there is no necessity for him to even discuss about the 1st respondent's resignation from FS Automation and just focus on the applicant's company.

(c) Placing too much importance on the fact as to who brought up the issue of resignation from FS Automation Pte Ltd ie, either the 1st respondent or the company's General Manager, Mr YT Loy or Mr Andrew Yew during the dinner on 24 August 1998, when the issue before the court was whether the 1st respondent was forced to resign by the applicant's company.

(d) Giving too much weight to the applicant's company conduct of not giving the 1st respondent a room to sit when he reported for duty at the applicant's company, not giving him any work to do and taking away the tools of his trade. These are not the elements to be considered in determining whether there was a forced resignation.

Conclusion

[33] To sum up, upon perusal of the records of proceedings, the awards and the written submission of both parties, I find the learned chairman had failed to identify the issues, had asked himself the wrong questions, had taken into consideration irrelevant matters, had departed from the pleadings and had applied the wrong test and law in coming to his decision. The decision is perverse, irrational and unreasonable that no reasonable body or body of persons could have made in the circumstances.

[34] For the above reasons, I allowed this application with cost.